185 (2)

No. 10-742

In the Supreme Court of the United States

BNSF RAILWAY COMPANY, PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that petitioner had forfeited its objection to the timeliness of the Surface Transportation Board's adjudication of a challenge to petitioner's rates.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 604 F.3d 602. The final decision of the Surface Transportation Board (excerpted at Pet. App. 32a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2010. A petition for rehearing and rehearing en banc was denied on September 2, 2010 (Pet. App. 57a-60a). The petition for a writ of certiorari was filed on December 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a railroad that transports coal for respondents Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. (collectively, WFA). Pet. App. 6a. From 1984 to 2004, the terms of the transportation were governed by a long-term contract, under which the price of shipment gradually decreased from $4 per ton to $3 per ton. *Ibid.* When the contract expired, petitioner and WFA were unable to reach a new agreement, and petitioner set a common-carrier rate of $6 per ton. *Ibid.* Although that was a relatively low shipping rate for coal, the profit margins for petitioner were quite high. *Ibid.*

2. a. On October 19, 2004, WFA filed a complaint against petitioner with the Surface Transportation Board (Board), alleging that petitioner's rates were unreasonable. Pet. App. 6a. The Board is the federal agency with economic regulatory jurisdiction over the freight rail industry. 49 U.S.C. 10501 (2006 & Supp. III 2009). One of the Board's responsibilities is to assure that a carrier charges reasonable rates for "market dominant" traffic, *i.e.*, traffic as to which the carrier faces no effective competition. 49 U.S.C. 10701(d)(1); 49 U.S.C. 10707(a) and (c). If the Board determines that such a rate is unreasonable, it may award damages to an injured shipper, 49 U.S.C. 11704(b), and it may prospectively prescribe a maximum lawful rate, 49 U.S.C. 10704(a)(1).

A subsection of the statute that sets forth the Board's "[g]eneral authority," 49 U.S.C. 11701(a), specifies that "[e]xcept as otherwise provided in this part, the Board may begin an investigation under this part only

by complaint." Although the proceeding between the WFA and petitioner was initiated by complaint, the Board is also empowered to begin various types of proceedings on its own initiative. See 49 U.S.C. 10502(b), 10706(d), 10745, 11123(b)(1), 11322(c).

The general-authority statute further states that a "formal investigative proceeding begun by the Board" under Section 11701(a) "is dismissed automatically unless it is concluded by the Board with administrative finality by the end of the third year after the date on which it was begun." 49 U.S.C. 11701(c). The term "formal investigative proceeding begun by the Board" is not defined by statute, but the Board adheres to the interpretation of its predecessor agency, the Interstate Commerce Commission (ICC), of similar language in the ICC's governing statute as referring only to an investigation begun on the agency's own initiative. *Complaints Filed Pursuant to the Saving Provisions of the Staggers Rail Act of 1980 (Section 229, Public Law 94-448)*, 367 I.C.C. 406, 412 (1983); see C.A. App. 261-265. The ICC explained, among other things, that a contrary interpretation would "discourage settlements and encourage defendants to engage in dilatory tactics." 367 I.C.C. at 411.

b. In February 2006, shortly after the parties had submitted evidentiary presentations in the proceedings initiated on WFA's complaint, the Board ordered those proceedings—as well as similar proceedings against petitioner instituted by AEP Texas North Company (AEP Texas)—held in abeyance. Pet. App. 7a; C.A. App. 102-139. The Board explained that it was commencing a rulemaking to adjust the manner in which the reasonableness of rates like those at issue would be deter-

mined, and that it intended the new methodology to apply to pending cases. Pet. App. 7a; see *id.* at 5a. The Board informed the parties that they would be given an opportunity to submit supplemental evidence relevant to the new methodology after the rulemaking was complete. *Id.* at 7a.

WFA unsuccessfully objected to the continuance, arguing, among other things, that it would be prejudiced by delay. C.A. App. 144-152, 260. Petitioner argued that delay would not prejudice either WFA or AEP Texas. Pet. App. 10a; C.A. App. 261, 265.

In October 2006, the Board promulgated its new final rule. C.A. App. 177-254 (*Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1)). The Board directed the parties in both this case and the AEP Texas case to supplement the existing record with additional evidence necessary to apply the new methodology to WFA's and AEP Texas's existing substantive submissions. Pet. App. 7a; C.A. App. 255-259.

c. On September 7, 2007, after the record had been supplemented, the Board issued a decision concluding that petitioner "has market dominance over the transportation at issue," and was therefore required to charge reasonable rates, but that WFA had "failed to establish that the challenged rates [were] unreasonably high." Pet. App. 23a. The Board agreed with WFA, however, that the amendment to the governing rules in the midst of this case "clearly could have prejudiced WFA," which might have "offered a different case" had it anticipated the new standard that would be applied. *Id.* at 26a. The Board decided, in the interest of "fairness," to permit WFA the opportunity to revise relevant portions of its case to take account of the rule change.

Id. at 26a-27a. The Board directed the parties to "identify technical or substantive errors" in its September 7, 2007 decision in a timely motion for reconsideration. *Id.* at 31a n.28.

Petitioner filed such a reconsideration motion on October 22, 2007. C.A. App. 448-452. Although petitioner's filing observed that "over three years" had passed since WFA's initial complaint, *id.* at 452, petitioner did not suggest that the Board was required by statute to dismiss the proceeding. Pet. App. 16a. The Board denied petitioner's motion for reconsideration. *Ibid.* The Board noted in its order denying reconsideration that the parties had agreed to a procedural schedule for future filings in the case. *Ibid.*

d. Nearly nine months later, in its scheduled July 2008 response to WFA's new evidentiary submission, petitioner suggested for the first time that the proceeding should in fact have been dismissed on October 19, 2007, for failure to comply with the three-year deadline in 49 U.S.C. 11701(c). Pet. App. 9a. In its response, WFA disputed petitioner's construction of the statute. C.A. App. 576-578. WFA noted that the Board and the ICC had interpreted the three-year time limit not to apply to this sort of complaint-initiated proceeding, and it further argued that application of such a time limit would violate its due process rights. *Id.* at 578.

WFA also "emphasized that [petitioner] had not objected to the procedural schedules advancing the proceeding to July 2008" and had stated in previous filings that "delay caused by the rulemaking would not prejudice WFA's case." Pet. App. 10a. WFA observed that identical factors had led the Board to conclude that a similarly dilatory time-limit argument in the related

AEP Texas case (which also had been held in abeyance for the rulemaking) was barred by "basic equitable considerations." C.A. App. 578; see *id.* at 265.

In February 2009, the Board issued a final order finding for WFA on the merits of its complaint under the new methodology (with total relief estimated to be approximately $345 million), Pet. App. 32a-33a, and rejecting petitioner's argument that the Board had violated what petitioner asserted was a requirement in 49 U.S.C. 11701(c) that the proceeding be completed within three years, Pet. App. 35a-36a. On the latter issue, the Board reiterated its longstanding position that the three-year time limit in 49 U.S.C. 11701(c) applies only to proceedings initiated by the Board itself. Pet. App. 36a.

3. Petitioner sought judicial review of the Board's decision in the court of appeals. See 28 U.S.C. 2321(a). Petitioner argued, among other things, that 49 U.S.C. 11701(c) had required dismissal of WFA's complaint in October 2007. Pet. App. 11a. One week before oral argument, the court ordered the parties to be prepared to address (1) whether petitioner had forfeited any argument that the complaint should have been dismissed in October 2007 by waiting until July 2008 to raise that argument, and (2) whether the Board had forfeited its right to rely on such forfeiture by not arguing the forfeiture issue in the court of appeals. *Id.* at 55a. At oral argument, the Board took the position that petitioner had forfeited its Section 11701(c) argument and that the court of appeals could so hold.

The court of appeals held that the Section 11701(c) argument had not been timely raised by petitioner before the Board. Pet. App. 15a-17a. The court stated that "a reviewing court generally will not consider an

argument that was not raised before [the] agency 'at the time appropriate to its practice.'" *Id.* at 15a (quoting *BNSF Ry.* v. *STB*, 453 F.3d 473, 479 (D.C. Cir. 2006) (quoting *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952))). The court observed that petitioner in this case had waited three years and nine months to raise the Section 11701(c) argument, had passed up several opportunities to raise it earlier, and had not given a reasonable explanation for its delay. *Id.* at 15a-17a. The court additionally noted that although "a forfeiture can be forfeited" by failing to argue it on appeal to a court of appeals, precedent applying that rule was "inapplicable" here because the Board "never acquiesced in [petitioner's] view that section 11701(c)'s three-year limit applied to complaint-initiated investigations and rejected [petitioner's] argument on the merits when it was first raised in July 2008." *Id.* at 17a.

On the merits, the court of appeals remanded for the Board to address one specific substantive argument raised by petitioner. Pet. App. 22a. Petitioner's request for review was otherwise denied. *Ibid.*

ARGUMENT

This court of appeals' narrow, fact-bound decision does not warrant review by this Court. The panel concluded that, in the particular circumstances of this case, petitioner's conduct in Board proceedings failed timely to present its Section 11701(c) argument. Pet. App. 15a. The court observed, among other things, that petitioner: (1) had failed to raise the issue in seeking reconsideration of the Board's September 7, 2007 order permitting WFA to modify its submission in the case, even though the proceedings had already extended beyond three

years; (2) had waited until nine months after the expiration of the asserted three-year time limit to make the argument for the first time; and (3) had agreed to a procedural schedule with filing deadlines well past the three-year mark without raising a Section 11701(c) objection. *Id.* at 15a-16a. Contrary to petitioner's contentions (Pet. 12-26), the court of appeals' circumstance-specific conclusion does not conflict with either *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), or *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), or with any of the decisions petitioner cites from other courts of appeals.

1. Petitioner first contends (Pet. 12-13) that the disposition by the court of appeals is inconsistent with *Chenery*'s admonition that a court is "powerless to affirm . . . administrative action by substituting what it considers to be a more adequate or proper basis" for that action. Pet. 12 (quoting 332 U.S. at 196) (emphasis omitted). Petitioner's contention is misplaced, because "the *Chenery* doctrine is not applied inflexibly." *Fleshman* v. *West*, 138 F.3d 1429, 1433 (Fed. Cir.) (internal quotation marks omitted), cert. denied, 525 U.S. 947 (1998). As relevant here, it "does not require a remand to the agency if it is clear that the agency would have reached the same ultimate result had it considered the new ground." *Ibid.*; see *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969); accord, *e.g.*, *Sundor Brands, Inc.* v. *NLRB*, 168 F.3d 515, 519 (D.C. Cir. 1999); *Glissen* v. *United States Forest Serv.*, 138 F.3d 1181, 1183 (7th Cir.), cert. denied, 525 U.S. 1022 (1998).

The record in this case establishes that, had it reached the issue, the Board would have sustained WFA's objection to the timeliness of petitioner's Section

11701(c) argument. As WFA pointed out in its filing with the Board, the Board had already found the same argument by the same petitioner in identical circumstances in the related AEP Texas case to be untimely. C.A. App. 578. The Board had issued a single order holding in abeyance both this proceeding and the AEP Texas proceeding, *id.* at 102-139, and petitioner had asserted in response to that order that neither AEP Texas nor WFA would be prejudiced by delay. Pet. App. 10a; C.A. App. 265. When petitioner later raised a Section 11701(c) argument in the AEP Texas case, the Board concluded that the argument had been relinquished by petitioner's prior litigation conduct. C.A. App. 265. The Board explained that, "[h]aving represented to both this agency and AEP Texas that the extended schedule was acceptable, basic equitable considerations preclude [petitioner] from claiming that AEP Texas' complaint must now be terminated." *Ibid.*

The Board would have no reason for reaching a different conclusion in this case. Indeed, were the Board to treat this case differently from the AEP Texas case, WFA might well claim that such action was arbitrary and capricious.[1] Not only does this case involve precisely the same conduct by petitioner that the Board found inequitable in the AEP Texas case (a representation by petitioner that delay would cause no preju-

[1] Petitioner's argument (Pet. 22) that the Board's rules permit dismissal motions at any time provides no meaningful distinction between the cases, as those rules applied equally to the AEP Texas case. Moreover, petitioner here did not raise its Section 11701(c) argument in a motion to dismiss, see p. 5, *supra*, and the Board did not construe petitioner's Section 11701(c) argument as such a motion.

dice), but it involves additional inequitable conduct as well, including petitioner's failure to raise the Section 11701(c) argument within the time the Board identified for objecting in a motion for reconsideration to the September 7, 2007 order extending the case beyond three years, and petitioner's agreement to a procedural schedule that contemplated substantive filings after the three-year mark. See pp. 4-5, *supra*; Pet. App. 15a-17a, 31a n.28. Because, as discussed above, *Chenery* does not require a court to prolong proceedings when the ultimate conclusion is not in doubt, this case is not one in which a remand of the matter to the Board for further proceedings is required.[2]

2. Petitioner next contends (Pet. 21-24) that the decision below runs afoul of *Vermont Yankee* because it improperly imposed a judicially crafted rule on agency proceedings. The Court in *Vermont Yankee* reversed a decision in which the court of appeals had "struck down [an agency] rule because of the perceived inadequacies of the procedures employed in the rulemaking proceedings." 435 U.S. at 541; see *id.* at 525. The Court stated that "[a]bsent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Id.* at 543.

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[2] Aside from erroneously suggesting (Pet. 23) that the Board silently addressed and rejected WFA's argument, petitioner offers no reason why the Board would be unable to consider that argument in the event of a remand.

The decision below does not conflict with *Vermont Yankee*. Unlike in *Vermont Yankee*, the court of appeals here neither invalidated agency action nor purported to prescribe new procedural rules for agency decision-making. Petitioner asserts that it is "plain" that "the Board itself believed the [Section 11701(c)] argument was timely," Pet. 23 (emphasis omitted), and criticizes the court of appeals for imposing a view contrary to the agency's. But for reasons just explained, the record demonstrates that the agency would *not* find the Section 11701(c) argument timely were it to address WFA's timeliness objection, because it had already reached that conclusion in the directly parallel AEP Texas case. See pp. 8-10, *supra*. And nothing in the court of appeals' decision constrains the Board's ability to formulate and apply its own timeliness rules in future cases.

3. Petitioner further contends (Pet. 13-20) that the result in this case conflicts with decisions in other circuits, citing a number of cases in ostensible support of the proposition that "a court may not refuse to address an argument challenging agency action based on administrative forfeiture when the agency itself did not find forfeiture and decided the argument on the merits." Pet. 16-20. Those cases differ materially from this one, and this case does not implicate any conflict among the circuits.

Most of the cases cited by petitioner involve the following fact pattern: An individual presents a procedurally defective claim against an agency to an internal component of that agency (*e.g.*, an agency employee presents an untimely discrimination claim to the agency's equal employment opportunity office). The agency rejects the claim on the merits, without mentioning the

procedural defect. The individual seeks judicial review against the agency (sometimes after further administrative review). The court holds that the agency, by denying the claim on the merits in its internal administrative proceedings, has given up its right in judicial proceedings to rely on the procedural defect. See *Hall* v. *Department of Treasury*, 264 F.3d 1050, 1060-1061 (Fed. Cir. 2001); *Ester* v. *Principi*, 250 F.3d 1068, 1071-1072 (7th Cir. 2001); *Jorge* v. *Department of Treasury*, 19 Fed. Appx. 892, 899 (Fed. Cir. 2001); *Labrada* v. *Department of Treasury*, 19 Fed. Appx. 883, 891 (Fed. Cir. 2001); cf. *Horton* v. *Potter*, 369 F.3d 906, 911 (6th Cir. 2004) (involving internal agency complaint); *Bruce* v. *United States Dep't of Justice*, 314 F.3d 71, 74 (2d Cir. 2002) (same); *Momah* v. *Dominguez*, 239 Fed. Appx. 114, 121 (6th Cir. 2007), cert. denied, 554 U.S. 902 (2008).

In those cases, unlike this one, the agency was an interested party that failed to raise an argument in its own defense. In this case, by contrast, the Board was a disinterested adjudicator in a dispute between private parties. One of those interested parties (WFA) raised the timeliness objection before the Board, relying on a directly parallel case in which the Board had found the same Section 11701(c) argument untimely, while also disputing petitioner's Section 11710(c) argument on the merits. The Board's decision to reject petitioner's argument on the merits, rather than addressing a procedural obstacle to that argument (timeliness), should not be held against the interested litigant (WFA), which properly raised both objections in the agency proceedings.

WFA's preservation of this issue similarly distinguishes this case from the remaining decisions on which

petitioner relies, which involve immigration proceedings. None of those cases cited by petitioner is comparable to this one. They all involved situations in which an alien failed to preserve an argument before the BIA; the BIA (generally) addressed the argument anyway; the alien was denied relief and sought judicial review; and the court of appeals held that it could review the BIA's resolution of the issue. *Lin* v. *Attorney Gen.*, 543 F.3d 114, 122-125 (3d Cir. 2008); *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1118-1222 (10th Cir. 2007); *Abebe* v. *Gonzales*, 432 F.3d 1037, 1040-1041 (9th Cir. 2005) (en banc); *Abdelqadar* v. *Gonzales*, 413 F.3d 668, 670-671 (7th Cir. 2005). Those cases did not involve the situation here, in which a procedural objection was raised and preserved by a private litigant, and the adjudicating agency did not resolve the procedural objection because it decided the case in the private litigant's favor in any event on an alternate ground, which was also raised by the private litigant.

4. Petitioner's characterization (Pet. 26) of the decision below as "judicial intervention run riot" lacks merit. The circumstances of this case—in which the court of appeals essentially adopted a timeliness argument, preserved by a private litigant, that the agency itself had applied in an identical situation—are relatively unique.[3] In these circumstances, the court of appeals' decision

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[3] Petitioner briefly suggests (Pet. 23-24) that the decision below is not an isolated ruling by the court of appeals. But in support of that suggestion, it cites a single additional decision, *J.J. Cassone Bakery, Inc.* v. *NLRB*, 554 F. 3d 1041 (D.C. Cir. 2009). That case, in which the court of appeals declined to reach an argument that the agency itself did not address, see *id.* at 1043-1044, 1046, presents a different set of circumstances and was not cited in the decision below.

cannot be seen as disrespecting *Chenery*. The panel was well aware of *Chenery*, which petitioner had relied on at oral argument, Pet. App. 64a, and the panel cited *Chenery* elsewhere in its decision (in declining to adopt a substantive argument offered by WFA that the Board itself had not relied upon). *Id.* at 22a. And not a single judge on the court of appeals requested a vote on petitioner's request for en banc review, *id.* at 59a, suggesting that the panel's decision was properly understood by other judges on the court as resting on the unique circumstances of this case rather than the sort of significant departure that petitioner asserts.

Moreover, even if petitioner's Section 11701(c) argument were found to have been timely raised, petitioner would not be entitled to relief. The Board, adhering to its longstanding position, correctly held that Section 11701(c) did not require the automatic dismissal of the proceedings initiated by WFA, after they had been held in abeyance with petitioner's support during the rulemaking proceedings. Contrary to petitioner's contention, the three-year time limit in Section 11701(c) applies only to proceedings initiated by the Board itself. Section 11701(c) requires the termination within three years of any "formal investigative proceeding begun by the Board under" 49 U.S.C. 11701(a). The phrase "formal investigative proceeding"—which is not defined by statute—does not refer to investigations begun "on complaint," referred to in one clause of Section 11701(a), but rather to Board-initiated investigations "otherwise provided in this part," referred to in a separate clause of Section 11701(a). See 49 U.S.C. 11701(a) ("*Except as otherwise provided in this part*, the Board may begin an investigation *under this part* only on complaint.") (em-

phasis added); see 49 U.S.C. 10502(b), 10706(d), 10745, 11123(b)(1), 11322(c) (permitting Board to initiate proceedings in certain circumstances). The ICC had interpreted the phrase "formal investigative proceeding" in that way in the predecessor statutory provision when it enacted Section 11701(c), and Congress is presumed to have adopted that interpretation. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Congress, moreover, could not have intended that a private shipper's ability to obtain relief would depend upon the pace of agency proceedings, a factor largely beyond its control and subject to manipulation by a railroad, which might deliberately seek to extend the proceedings.

To the extent that the Court nevertheless believes that there is language in the court of appeals' opinion that could be read to extend beyond the particular circumstances of this case and possibly suggest a departure from administrative-law principles—or that the Court believes the opinion is not sufficiently clear—the Court could grant the petition, vacate the judgment, and remand for further proceedings. The court of appeals could then explain its reasoning further; remand to the Board to address WFA's timeliness objection in the first instance; or simply affirm the Board's conclusion that Section 11701(c) does not apply to proceedings that are initiated by complaint. Principles of judicial economy, however, suggest that the preferable course is simply to deny certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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